Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-2068

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

IN THE MATTER OF
LAVOYD WAYNE HARDIN,
a/k/a "BILL HARDIN" DEBTOR,

LAVOYD WAYNE HARDIN,
a/k/a "BILL HARDIN",

PETITIONER.

VERSUS

CLIFFORD F. McMASTER, TRUSTEE

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
and
PETITIONER'S MOTION FOR LEAVE TO PROCEED AS A VETERAN

RESPONDENT'S BRIEF IN OPPOSITION

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CLIFFORD F. McMASTER, TRUSTEE

QUESTIONS PRESENTED FOR REVIEW

1.

Whether the Petitioner may proceed before this Honorable Court as a Veteran under 38 U.S.C. §2022.

2.

The questions presented for review by Petitioner are not germane to the judgment which is the basis of the Petition for Writ of Certiorari. The only issues germane to the petition are as follows:

A. Whether the United States Bankruptcy Court had jurisdiction over these proceedings.

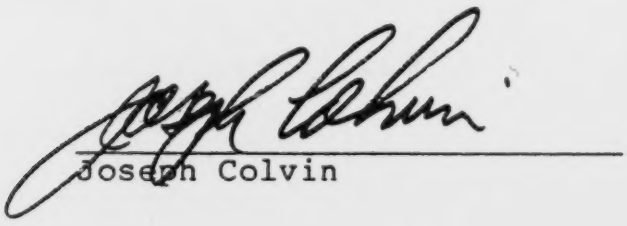
B. Whether the United States Bankruptcy Judge's findings of fact were clearly erroneous.

C. Whether the United States Bankruptcy Judge's conclusions of law were correct as reflected in his judgment and memorandum of decision entered July 14, 1986.

CERTIFICATE OF PARTIES TO THE PROCEEDING

The undersigned counsel of record for Clifford F. McMaster, Trustee, Respondent, certifies that the following are parties to this proceeding:

1. Lavoyd Wayne "Bill" Hardin
2. Clifford F. McMaster



Joseph Colvin

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JUDGMENTS BELOW

FIFTH CIRCUIT APPEALS:

84-1037 - judgment of district court affirmed, 8/22/84

84-1250 - dismissed for want of prosecution, failure to file briefs, 5/22/84

84-1396 - appeal dismissed, 9/26/84

84-1614 - appeal held frivolous, 12/20/84

84-1615 - judgment of district court affirmed, 12/20/84

85-1686 - appeal dismissed, 2/24/86

85-1726 - judgment of district court affirmed, 3/17/86

86-1545 - appeal dismissed, 11/20/86

86-1914 - judgment of district court affirmed, 4/1/87

APPEALS TO THE U.S. SUPREME COURT:

85-2135 - petition for certiorari denied, 11/17/86

STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. §1254.

TABLE OF CITATIONS

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11 U.S.C. §701 et seq.	25, 28
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THE FOLLOWING CASES INVOLVE RELATED ISSUES

Hardin v. Hardin, No. 84-1037,
United States Court of Appeals
for the Fifth Circuit
(affirmed 8/22/84)

Hardin v. McMaster, No. 84-1250,
United States Court of Appeals
for the Fifth Circuit
(dismissed 5/24/84)

Hardin v. McMaster, No. 84-1396,
United States Court of Appeals
for the Fifth Circuit
(dismissed 9/26/84)

Hardin v. McMaster, No. 84-1614,
United States Court of Appeals
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(affirmed 12/20/84)

Hardin v. Arthur, No. 84-1615,
United States Court of Appeals
for the Fifth Circuit
(affirmed 12/20/84)

Hardin v. Gilbert & Colvin, No.85-1686,
United States Court of Appeals
for the Fifth Circuit
(affirmed 2/24/86)

Hardin v. Gilbert & Colvin, No. 85-1726,
United States Court of Appeals
for the Fifth Circuit
(affirmed 3/17/86)

Hardin v. Gilbert & Colvin, No. 85-2135, United States Supreme Court (Certiorari denied 11/17/86)

Hardin v. McMaster, No. 86-1545, United States Court of Appeals for the Fifth Circuit (dismissed 11/20/86)

Hardin v. McMaster, No. 86-1914, United States Court of Appeals for the Fifth Circuit (affirmed 4/1/87)

STATEMENT OF THE CASE

Petitioner has filed his petition for writ of certiorari and has included therein a motion for relief to proceed as a veteran pursuant to 38 U.S.C. §2022.

Petitioner's petition for writ of certiorari results from nine (9) previously unsuccessful appeals in the United States Court of Appeals for the Fifth Circuit. The prior appeals bear the following numbers: 84-1037, 84-1250, 84-1396, 84-1614, 84-1615, 85-1686, 85-1726, (Cert. denied U.S. Supreme Court 85-2135), 86-1545 and 86-1914. This petition for writ of certiorari is based on the affirmation of the judgment of the district court in Appeal No. 86-1914 on April 1, 1987. That appeal was from an

order affirming the judgment of the bankruptcy court which found, based on the facts and the law, that the claims asserted by petitioner were frivolous in every respect, as they had been scrutinized in at least three interlocutory appeals to the Fifth Circuit and found to be without merit.

SUMMARY OF ARGUMENT

The motion for relief to proceed as a veteran pursuant to 38 U.S.C. §2022 is not applicable to these proceedings as petitioner, for the first time, is asserting that his suit against the trustee was to obtain reemployment rights. Petitioner's motion, affidavit and service record reflect he was discharged forty (40) years ago. Such statute is not applicable as the trustee

in bankruptcy at no time was petitioner's employer, nor was there any showing in either the Bankruptcy Court, District Court or Court of Appeals for the Fifth Circuit that petitioner sought or was entitled to any of the rights claimed by 38 U.S.C. §2021.

Petitioner's questions presented for review have been partially, previously presented in his prior petition for writ of certiorari No. 85-2135, which petition was refused by this court. This new petition for writ of certiorari should be denied because petitioner has not raised any issues attacking the judgment that is the basis for the petition. Instead, for the first time he attempts to utilize various sections of 11 U.S.C. §1301 et seq. to justify his conversion of the proceeds of two checks which the court

found to be assets of the chapter 7 estate and rightfully belonged to the Trustee. Not only does petitioner misinterpret those sections which he cites, but he fails to mention that his Chapter 13 bankruptcy proceeding was converted to one under Chapter 7 in 1982 for failure to file an amended plan by the court-ordered deadline. Because all property of the estate vested in the Trustee some five years ago, the title 11 sections enumerated by petitioner have no bearing on the issues at hand.

ARGUMENT

This litigation, seeking to challenge a judgment affirming the findings of the bankruptcy court with respect to jurisdiction and findings of fact and conclusions of law, constitutes

the latest in a long series of efforts by Lavoyd Wayne "Bill" Hardin to harass the Trustee of his estate, as well as to waste judicial time and resources by continuing to perfect frivolous and unmeritorious appeals.

Respondent would show that the motion for leave to proceed as a veteran could not, under any of the facts in these proceedings, entitle petitioner to the benefits or rights under 38 U.S.C. §§2021, 2022. The petitioner, for the first time, asks leave of the court to establish reemployment rights as a veteran. The facts as enumerated have never been presented in any other court in these proceedings other than in the petition for writ of certiorari. Such petition includes three (3) documents addressing petitioner's right to proceed

as a veteran pursuant to 38 U.S.C. §2022. The first document is the motion itself where petitioner seeks to establish re-employment rights. The second document is petitioner's affidavit, and the third is a copy of petitioner's discharge from the Armed Forces. The statute under which petitioner moves sets forth certain rights.

United States Code, 38 U.S.C. §2021 provides in pertinent part as follows:

§2021. Right to reemployment of inducted persons; benefits protected

"(a) In the case of any person who is inducted in the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position

(other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year."

The enforcement rights claimed under such subsections are provided in United States Code 38 U.S.C. §2022, which provides in part as follows:

§2022. Enforcement procedures

"If any employer, who is a private employer or a State or political sub-

division thereof, fails or refuses to comply with the provisions of section 2021(a), (b)(1), or (b)(3), or section 2024, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action."

Petitioner's motion on its face shows non-compliance with 38 U.S.C. §2021

as petitioner's discharge which satisfied 38 U.S.C. §2021a(1) shows petitioner to have been discharged forty (40) years ago and thus on its face shows non-compliance with 38 U.S.C. §2021a(2) as petitioner has not alleged application for reemployment within ninety (90) days after such person is relieved from service. Petitioner's motion shows on its face the non-application of 38 U.S.C. §2021 and §2022 to his motion and substantiates Respondent's allegations that Petitioner has filed frivolous pleadings.

Petitioner's motion entitling petitioner to proceed under Rule 47 of the rules of this Honorable Court is an attempt by petitioner to exempt himself from the payment of fees and court costs to bring before this court an appeal pro-

ceeding which the bankruptcy court designated as frivolous in every respect and which the United States Court of Appeals for the Fifth Circuit described as a "totally frivolous appeal". Petitioner's writ of certiorari, therefore should not be entertained by this court as petitioner should be required to proceed as other citizens of the United States who seek to bring their cases before this court.

The writ of certiorari filed by petitioner presents for review matters all of which have been passed upon in appeals to the United States Court of Appeal for the Fifth Circuit and in the case of questions 2, 3 and 4 have been heretofore raised in a prior petition for writ of certiorari to this honorable court and refused. Respondent would show

that the issues addressed by the United States Court of Appeals for the Fifth Circuit were interpreted to be a challenge to the jurisdiction of the bankruptcy court and a challenge to the findings of fact and conclusions of law entered by the bankruptcy court regarding petitioner's homestead claims. Petitioner's writ could therefore be construed to present to this court those same issues and they therefore will be responded to in this brief.

I.

JURISDICTION

The United States Bankruptcy Court had jurisdiction over these proceedings when it entered its judgment and memorandum of decision on July 13, 1986. The United States Code, 28 U.S.C. §§157 and

1334 provide that the Bankruptcy Court has jurisdiction to hear proceedings arising under title 11 or arising in or related to a case under title 11.

The United States Code, 28 U.S.C. §1334, provides in pertinent part:

> (a) Except as proved in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

The proceeding that is the subject of this petition shows on its face that it is a claim of misapplication of property by a Trustee. Such property peti-

EDITOR'S NOTE

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tioner claimed to be misapplied was the 154 acres of the estate, sold by the trustee pursuant to a bankruptcy court order, appealed by petitioner and affirmed by the United States Court of Appeals for the Fifth Circuit No. 84-1037. The claims by petitioner therefore are subject to the District Court's exclusive jurisdiction pursuant to 28 U.S.C. §1334(d):

> " The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate."

The United States Court of Appeals for the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. §1291. Jurisdiction therefore, is firmly established.

II.

BANKRUPTCY COURT FINDINGS OF FACT

The Court is bound to accept the factual findings of the Bankruptcy Court unless such findings are clearly erroneous. Fed. R. Civ. P. 52(a); Fed. R. Bankr. P. 8013. Petitioner has made no showing that the findings of fact entered by the bankruptcy judge are clearly erroneous. Such findings were as follows:

"1. Bill Hardin and Joan Murle Hardin were divorced in 1976. As provided by their property settlement, Mrs. Hardin sold her one-half community interest in a 154 acre tract in Comanche and Erath Counties to Mr. Hardin, who executed a $25,000.00 promissory note with the farm as security for repayment

of the note. Payments of $1,500.00 were to be made annually to Mrs. Hardin under the note. Mr. Hardin made the first annual installment on time on December 31, 1976, but did not make a subsequent payment on December 31, 1977 or at any time thereafter.

2. Mrs. Hardin sued Mr. Hardin in state court in 1978 on the unpaid balance of the promissory note and for foreclosure, and obtained an order from the district court that the note be accelerated and that the deed of trust lien be foreclosed. The Court of Appeals reversed the decision, but the Texas Supreme Court affirmed the District Court and ordered a sheriff's sale of the property. Hardin v. Hardin, 597 S.W.2d 347 (Tex.Sup.Ct. 1980). Before the property could be sold by the sheriff, however,

Hardin filed a Chapter 13 bankruptcy proceeding in this Court on October 31, 1980.

3. On January 27, 1982 at a Chapter 13 plan confirmation hearing, this Court held that Hardin could deaccelerate the promissory note without curing the default, but that he must compensate his former wife for any damages she suffered as a result of the deacceleration. Hardin was ordered to file an amended Chapter 13 plan by April 19, 1982. When Hardin failed to do so by the court-ordered deadline, Mrs. Hardin filed a motion to convert this case to Chapter 7. This Court held a hearing on the motion on June 16, 1982. On that date, Hardin submitted an amended Chapter 13 plan which provided that Mrs. Hardin accept a lifetime one-half share and all income

from the 154 acres in satisfaction of all her claims. Mrs. Hardin rejected the amended plan and the Court converted the proceeding to Chapter 7.

4. Following the conversion of this proceeding to Chapter 7, Mr. Clifford McMaster was appointed as the Chapter 7 trustee of the estate.

5. Mr. Hardin's subsequent motion to convert the proceeding to Chapter 11 was denied after a hearing on September 15, 1982. on September 22, 1982, this Court further determined that Hardin could not claim the 154 acre tract as his homestead (exempt property). [Hardin having claimed a house in DeLeon, Texas as his homestead and the court having granted such exemption.]

6. Hardin then appealed the Order Denying Motion to Convert Chapter 11

Proceeding and the Order on trustee's Objection to the Debtor's Claimed Exemptions to the District Court. The District Court affirmed on November 30, 1983, and the United States Court of Appeals from the Fifth Circuit affirmed the District Court on August 22, 1984 (Appeal No. 84-1037).

7. Although all property of the estate had vested in the Chapter 7 Trustee, Hardin attempted to convey his interest in the 154 acre tract to a Mr. J. A. Hardin on August 24, 1983, and on January 6, 1984 the Texas Veterans Land Board deeded the property to J. A. Hardin. After notice and hearing, this Court declared both conveyances void and ordered J. A. Hardin to reconvey the 154 acres to the Trustee.

8. The District Court on March 9, 1984 ordered J. A. Hardin to execute a

deed or appear at a March 20, 1984 hearing to "show cause" why he should not be held in contempt. Hardin (Lavoyd Wayne) but not J. A. Hardin, attempted to appeal the March 9, 1984 district court show cause order to the United States Court of Appeals for the Fifth Circuit (Appeal No. 84-1250), but the appeal was dismissed on May 24, 1984 for failure of appellant to file briefs.

9. On March 14, 1984, J. A. Hardin conveyed the 154 acres to the Trustee as ordered by this Court. The Texas Veterans Land Board then gave the Trustee a deed to the 154 acres.

10. After notice and a hearing, the Trustee sold the 154 acres to James Arthur pursuant to court order dated April 5, 1984.

11. Following conveyance of the property by the Trustee to Mr. Arthur,

Hardin entered on the property, planted a crop of alfalfa and harrassed Mr. Arthur. Hardin also admitted to cutting the owner's lock on the gate in order to gain access to the property. The Trustee was then forced to come back to court to seek an injunction against further harrassment attempts by Hardin against the third-party purchaser. An injunction was issued by this Court, appealed to the District Court, and affirmed by the United States Court of Appeals for the Fifth Circuit on December 20, 1984 (Appeal No. 84-1615).

12. On May 21, 1984, trial before the Court was held on a Complaint filed by the Trustee regarding the proposed disposition of the sales proceeds of the 154 acres. Mrs. Hardin was allowed a secured claim in the amount of $52,048.99 pursuant to her lien and reimbursement

for attorney's fees in the amount of $8,100.00 and expenses in the amount of $491.30. Judgment was entered by this Court on May 21, 1984, appealed to the District Court and affirmed by the United States Court of Appeals for the Fifth Circuit on December 20, 1984 (Appeal No. 84-1614).

13. With respect to the Trustee's Counterclaim, the Court finds from the evidence that Hardin collected and cashed checks representing rentals from a grazing lease on the subject 154 acres although the checks were property of the bankruptcy estate and subject to the jurisdiction of this Court. Such payments totalled $7,000.00.

14. Hardin now seeks a recovery from the Trustee for "misapplication of fiduciary property" regarding the sale of the

154 acres. Hardin seeks damages in the amount of $184,800.00 plus costs and attorney's fees. The claims asserted by Hardin in this proceeding are clearly frivolous. The Court further specifically finds that the claims alleged in this Adversary Proceeding were intended to harrass, cause undue delay and increase the cost of litigation.

15. The Court further finds that the Trustee has incurred reasonable and necessary attorney's fees in the amount of $1,650.00 and $149.00 in expenses in defending the frivolous claims asserted in this Adversary Proceeding by Hardin.

The bankruptcy judge's findings are duly supported not only by the record in this proceeding, but by the record in prior proceedings. The United States Bankruptcy Court has previously found

that the 154 acre tract of land at issue is property of the estate by an order which was affirmed by the United States Court of Appeals for the Fifth Circuit in proceeding No. 84-1396.

Petitioner at the trial, offered no evidence to support his claims of misapplication of fiduciary property and has made no showing that the findings of fact are erroneous, therefore the petition for a writ should be denied.

III.

BANKRUPTCY COURT CONCLUSIONS OF LAW

The Bankruptcy Court's conclusions of law are correct. The conclusions of law set forth by the bankruptcy judge are clearly supported by the cases cited in the memorandum opinion signed July 13, 1986. These conclusions are that the

Bankruptcy Court had jurisdiction of the subject matter pursuant to 28 U.S.C. §1334, which has been supported on appeal by the judgment of the Honorable David O. Belew, signed July 16, 1986 in proceeding no. 4-86-493-K. In addition, the 1983 amendments to Fed. R. Civ. P. 11, and specifically Fed. R. Bankr. P. 9011, provided that the signature of an attorney or a party constitute a certificate that he has read the pleading and that same has not been interposed for any improper purpose such as harassment, unnecessary delay or needless increase in cost of litigation. The requirements of these rules apply to pro se litigants. Additionally, costs of proceeding may be assessed under Fed. R. Bankr. P. 9011. The bankruptcy judge found, based on the facts and the law, that the claims

asserted by appellant were frivolous in every respect, having been found, after scrutiny by the United States Court of Appeals for the Fifth Circuit, to be without merit.

This petition is a reflection of an increasing abuse of the judicial process by petitioner. Having failed in numerous previous attempts to rehash his ten-year court history in both federal and state courts, Petitioner would now misapply the provisions of 11 U.S.C. §1301 et seq. to his bankruptcy estate, which, since 1982, has been administered under 11 U.S.C. 701 et seq. Sanctions should be imposed to prevent abuse of the appellate process and to compensate those required to prosecute or defend their rights in court. The authority for imposition of sanctions can be found in Fed. R. Civ. P. 11, which states in pertinent part:

> The signature of an attorney or a party constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation... If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorneys' fee.

28 U.S.C. §1927 provides as follows:

> Any attorney or other person admitted to conduct cases in any court in the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees incurred because of such conduct.

Section 1927 is a weapon which the court may use in order to protect the judicial

process from abuse, to punish those who have abused it, and to provide relief for the party who has had to contend with the sanctioned party's vexatious litigation.

The sanctions which should be imposed are not only proper, but are necessary to protect the integrity of the judicial process. The best way to control unjustified tactics in litigation is to ensure that those who create costs also bear them. This Honorable Court should assess attorneys' fees and expenses against petitioner, who has willfully abused the judicial process.

The petition for writ of certiorari is principally based upon sections of the Bankruptcy Code commonly known as Chapter 13. These sections were found in 11 U.S.C. §1302 et seq. Petitioner's bankruptcy proceeding since 1982, has not

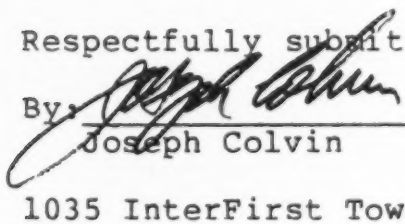
been administered under 11 U.S.C. §1301 et seq., but has been administered under 11 U.S.C. §701. The sections therefore cited in the brief by petitioner are not applicable or constitute blatant misstatements on a non-applicable statute.

For instance, Petitioner states "In Hardin's case 1307 of the Bankruptcy Code prohibits conversion of a Chapter 13 case to a Chapter 7." Hardin appealed such conversion to the District Court and advised the District Court in a hearing conducted on November 3, 1983, that he was abandoning such appeal." Hardin v. Hardin, United States District Court for the Northern District of Texas Memorandum Opinion, Civil Action No. 4-82-595-E dated November 30, 1983.

Respondent would show that the petitioner has therefore not raised any

issues germane to the judgment appealed, but is using the petition for writ of certiorari in an effort to bring before this court matters heretofore decided adversely to the petitioner by the United States Court of Appeals for the Fifth Circuit. The petition for writ of certiorari should, therefore be denied.

Respectfully submitted,

By: 
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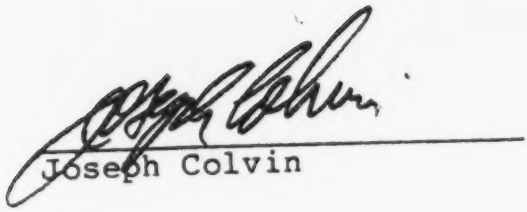
CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing have been served on all counsel of record, by mailing sets of same, on this 23 day of July, 1987.



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